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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 508

O. O. OWENS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 28-30) are unreported. The opinion of the Court of Appeals (R. 796-799) is reported at 177 F. 2d 692.

JURISDICTION

The judgment of the Court of Appeals was entered November 1, 1949. (R. 800.) The petition for writ of certiorari was filed December 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the decision of the Board of Tax Appeals in a prior proceeding (which forms the basis of this suit), redetermining a deficiency in taxpayer's income tax for the year 1920, and its affirmance by the Court of Appeals, were unlawfully entered and void. This in turn depends upon whether the Court of Appeals exceeded its jurisdiction, and whether the District Court, in the present proceeding, erred in finding that the evidence did not support taxpayer's claim of conspiracy (allegedly involving the Commissioner of Internal Revenue and others) to deprive him of his day in court.

STATEMENT

The United States brought this suit (R. 3-5) against taxpayer to enforce collection of deficiency in income tax as determined by the Commissioner of Internal Revenue, and later affirmed by the Board of Tax Appeals and the Court of Appeals for the Tenth Circuit. *Owens* v. *Commissioner,* 125 F. 2d 210, certiorari denied, 316 U. S. 704, rehearing denied, 317 U. S. 704.

The facts as found by the District Court (R. 28-30) may be summarized as follows:

On February 13, 1926, the Commissioner determined a deficiency in the taxpayer's income tax liability for the taxable year 1920, and on that date sent him, by registered mail, a written notice of such determination. Within sixty days thereafter, a petition was filed by the taxpayer with the Board

of Tax Appeals seeking a redetermination of such deficiency. On February 13, 1941, the Board redetermined such deficiency in the sum of $28,260.61. On May 18, 1941, the taxpayer filed a petition for review of the Board's decision with the Court of Appeals for the Tenth Circuit, but filed no bond for a stay of assessment or collection thereof. On May 29, 1941, the Commissioner made an assessment of the sum of $28,260.61 together with interest in the sum of $25,872.39, making a total of $54,133. This was forwarded to the Collector of Internal Revenue for the District of Oklahoma, who on June 3, 1941, gave notice to the taxpayer and demanded payment of the sum of $54,133. On January 13, 1942, the Court of Appeals affirmed the order of the Board, and on February 26, 1942, denied the taxpayer's application for a rehearing. On June 8, 1942, this Court denied the taxpayer's petition for certiorari. (R. 28-29.)

On December 6, 1946, there was paid by a third person the sum of $350 for application on the tax liability of the taxpayer, leaving an unpaid balance of $53,783. (R. 29.) This balance, plus interest, is still unpaid. (R. 29.)

As a defense to this proceeding, the taxpayer sought to show the existence of a conspiracy to deprive him of his day in court, but the District Court found that the evidence did not support such a claim. (R. 29.) The evidence relating to this charge of conspiracy will be stated in the Argument section of this brief.

Upon the foregoing findings, the District Court concluded that the Commissioner's determination of the tax assesment was a final and conclusive adjudication of the taxpayer's tax liability, and that the United States is entitled to judgment. (R. 29, 30.) The Court of Appeals affirmed. (R. 796-800.)

ARGUMENT

The petition for certiorari involves two basic questions: (1) Whether, throughout the prolonged course of the litigation involving taxpayer's tax liability for the year 1920, he has had his "day in court". (2) Whether a conspiracy to deprive him of his rights existed between agents of the Government and attorneys purporting to represent him. It is submitted that these issues were properly resolved against petitioner by both courts below. The case turns on its own peculiar facts. No general question of importance is raised which calls for further review.

1. The decision of the Board of Tax Appeals (upon which the present suit is based), redetermining taxpayer's income tax liability for 1920 (R. 167), was entered on taxpayer's petition for review (R. 347-353) after the proceeding had been restored to the calendar by order of the Board, vacating prior memorandum opinions in so far as they affected this proceeding (R. 409-411). Previously, the Board, upon stipulation, had disposed of this proceeding adversely to taxpayer (R. 385-394), the proceeding having theretofore (pursuant to ag[illegible]e-

ment of counsel (R. 366-367)) been consolidated with two proceedings involving taxpayer's income tax liability for 1923 and 1926. And the Board also denied taxpayer's motion to set aside such adverse disposition. (R. 398-411.)

The reason the Board ultimately vacated its prior orders in the case was that at the time the case was consolidated with the taxpayer's 1923 and 1926 cases and submitted on stipulation covering all three dockets (R. 375-385), it seemed seriously doubtful that one Secord, an attorney who appeared for taxpayer in all three dockets, had any authority whatever to represent him in the 1920 case and to enter into any stipulation which bound him as to that year.

Ultimately, the sole issue presented to the Board for its decision relating to the 1920 case was whether taxpayer was entitled to a certain deduction from gross income for that year. (R. 610, 619.) The decision of the Board denying the deduction was rendered upon a full hearing had before it, at which a new stipulation was introduced (R. 453), as well as evidence both oral and documentary adduced by the taxpayer and the Commissioner (R. 423-550), the taxpayer appearing *pro se,* as well as being represented by two lawyers (R. 424).

The taxpayer unquestionably had ample opportunity to litigate the only controverted issue in the case. He contends that in some way he was denied his day in court because of fraud and conspiracy between Secord and representatives of the Govern-

ment. But there is not the slightest justification for taxpayer's charges of fraud, conspiracy, and collusion, as we shall show in the succeeding paragraphs. Taxpayer also argues (Pet. 24-25) that the Court of Appeals denied him his day in court because it affirmed the Board's decision on a different ground from that given by the Board. The Board denied the deduction upon the ground that taxpayer was on the cash basis of accounting and was not entitled to a deduction since the money alleged to be paid was not paid in the taxable year; the Court of Appeals based its affirmance on the ground that the amount sought to be deducted was a capital outlay and therefore not deductible at all. But, of course, an appellate court is not limited to the grounds given by the lower tribunal. *Helvering* v. *Gowran,* 302 U. S. 238, 239, 245.

2. The District Court found that taxpayer had not made out a case of conspiracy and fraud. (R. 27, 29, 129-131.) This finding was made after the most vague and uncertain but continuously reiterated charges of the taxpayer, made throughout the trial (see, e.g., R. 60, 62, 63, 64, 65, 67-68, 69, 74-75, 90, 95, 96, 97, 107, 110-111, 118, 119, 120, 121-122, 126, 131), of a conspiracy on the part of Government officials and others wrongfully to defeat the taxpayer's alleged right to the deduction, and after the District Court permitted taxpayer to introduce evidence of substantially all the facts relating to the acquisition by him and his associates of

interests in the oil properties in question, including the record of the consequent litigation, and also substantially all of the facts relating to the Commissioner's deficiency determination for the taxable year 1920, including the record of the litigation arising therefrom. No other finding would have been supported by the record.

Taxpayer contends (Pet. 8-10, 16-17) that because of the conspiracy involving Secord, he was prevented from presenting his defense to the deficiency asserted by the Commissioner for 1920. But, as has been shown, the Board vacated (R. 409-411) its decision (R. 366-367) based upon the agreement to consolidate the 1920, 1923, and 1926 proceedings and upon the stipulation of facts (R. 375-385) entered into on behalf of taxpayer and the Commissioner, so far as it concerned the 1920 case; and the case was subsequently tried alone upon a new stipulation of facts (R. 453-460) and other evidence (R. 423-550). The stipulation which Secord had entered into was not introduced at this hearing, and there is nothing whatsoever in the record to substantiate the taxpayer's charge (Pet. 17) that the Board based its conclusion on such stipulation.

Moreover, the short answer to taxpayer's charges of conspiracy and fraud is that the Court of Appeals rejected them in the prior appeal. *Owens* v. *Commissioner,* 125 F. 2d 210, certiorari denied, 316 U. S. 704, rehearing denied, 317 U. S. 704. Secord's letter to taxpayer (R. 772-777) merely confirms the correctness of the District Court's finding. It is,

of course, true that in a proper proceeding, upon proper allegation and proof, a court of equity will set aside a judgment obtained by fraud extraneous to the record. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238; *United States* v. *Throckmorton*, 98 U. S. 61. But taxpayer's unsupported epithets and allegations do not make out a case of fraud. *Kent* v. *Lake Superior Canal Co.*, 144 U. S. 75, 91.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
EDWARD J. P. ZIMMERMAN,
Special Assistants to the Attorney General.

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